NEGLIGENCE AND THE ACT OF GOD

In *Railroad Company v. Reeves,* in the Supreme Court of the United States,[1] it was held, that where property in the charge of a common carrier for transportation is destroyed by an act of God, the carrier is excused from liability, though his own negligence or laches subjected the property to the calamity which otherwise it would have escaped. It is distinctly laid down that the maxim *causa proxima non remota spectatur* applies, and that all that is required of the carrier is ordinary diligence to avoid or remedy the effects of the overpowering cause. The Court cited with approval the decisions of the Supreme Court of Pennsylvania, in *Morrison v. Davis & Co,*[2] and of the Supreme Judicial Court of Massachusetts, in *Denny v. New York Central R. R. Co.*[3] In the latter case it was held, that a railroad company, that negligently delays the transportation of goods delivered to it as a common carrier, and then transports them safely to their destination, is not responsible for injuries to the goods by a flood while in its depot at that place, although they would not have been exposed to such injury but for the delay.

Quite recently the Supreme Court of Appeals of Virginia made a similar ruling in *Herring v. Chesapeake & Western R. R. Co.*[4] Still more recently, the Supreme Court of Kansas, in *Atchison, etc., Ry. Co. v. Henry,*[5] held, that as between the unjustifiable and negligent failure to deliver goods from a freight depot upon demand at a time when there was no reasonable ground to apprehend damage by flood, and an unprecedented flood, which a day later submerged the depot and the goods, to the damage of the latter, the flood, the act of God, and not the negligent omission to deliver, is the proximate cause of the damage. In the Kansas case, which follows the earlier decision of the same Court, in *Rodgers v. Railway Co.*,[6] the consideration is emphasized that at the time when the defendant negligently failed to make a delivery there were no reasonable grounds to apprehend the calamity which overtook defendant and the plaintiff's goods.

Opposed to the doctrine of these cases, there is the authority of the Court of Appeals of New York, as well as that of several

[1] 1869, 10 Wall., 176.
[2] 1852, 20 Penn. St., 171.
[3] 1859, 13 Gray, 481.
[4] 1903, 101 Va., 778.
[5] 1908, 97 Pac., 465.
[6] 1907, 75 Kan., 222.

other courts of last resort in recent utterances.[7] The substance of the New York decisions is conveyed by the following extract from the syllabus in *Read v. Spaulding*:[8]

"When a carrier is entrusted with goods for transportation, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy. And to avail himself of such exemption, he must show that he was himself free from fault at the time.

"His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected."

In *Bibb Broom Corn Co. v. Atchinson, etc., Ry. Co.*,[9] it was held by the Supreme Court of Minnesota, that if a carrier fails to forward goods without unreasonable delay, and because of such negligence they are "overtaken in transit and damaged by an act of God, which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligent and unreasonable delay is such a proximate or concurring cause as renders a carrier liable."

A similar view was taken by the Supreme Court of Iowa in *Green-Wheeler Shoe Co. v. Chicago, etc., Ry. Co.*[10] The opinion in this case, without expressly repudiating the "proximate cause" doctrine, advances a special and cogent argument to support the carrier's liability in the following language:

"It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost, it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable. In such a case it is said 'that no wrong-doer can be allowed to appor-

[7] *Michaels v. New York Central R. R. Co.*, 1864, 30 N. Y., 564; and *Read v. Spaulding, id.* 630.

[8] *Supra.*

[9] 1905, 102 N. W., 709.

[10] 1906, 106 N. W., 498.

tion or qualify his own wrong, and that, as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done.' *Davis v. Garrett.*[11] "

In *Alabama Great Southern R. R. Co. v. J. A. Elliott & Sons,*[12] it was held, that where a carrier delayed a shipment, with the result that the goods were exposed to a cyclone, it was liable "since its negligence, resulting in the delay at the place of shipment, continued to be the active cause."

The decided tendency at present, when courts are not controlled by previous local authority, is to follow the New York doctrine, rather than that of the Supreme Court of the United States. And this is obviously because of justice and expediency, rather than superior weight of technical reason. Some of the cases that decline to exonerate the carrier contend that its delay constitutes a "concurring" or a "continuing" cause. In one sense, this form of expression is legitimate, but, according to the real logic of the situation, the act of God is the "proximate cause, because it is an entirely independent cause." Some commentators, to justify mulcting the carrier, have even cited the famous "squib case," which actually has no application whatsoever, because it concerned a continuous and organic chain of causation, inevitably set in motion by the first throwing of the squib.

In *Foley v. McMahon,*[13] in the St. Louis Court of Appeals, Missouri,[13] this serviceable test is laid down:

"If the injury, whatever it may be, directly and naturally flows from the negligence complained of, the defendant is liable, though the particular injury would not ordinarily be expected to result from such negligence. On the other hand, if the injury is extraordinary and exceptional, such as no man could forsee or provide against, the defendant will not be liable, though the injury would not have happened but for his negligence."

It could not be claimed that the destruction of property by an act of God is ordinarily to be expected from negligent delay in forwarding; the injury is exceptional, and such as could not be forseen, according to the usual course of events. It seems to the writer very clear that under existing abstract rules the Supreme

[11] 6 Bing., 716.
[12] 1907, 150 Ala., 381.
[13] 90 S. W., 113.

Court of the United States, and the courts following it, have the best of the argument, with a result, however, so unjust and inexpedient as to call for a frank revision of premises. Practically, it is *reductio ad absurdum* to say that no matter how long a carrier's delay may be, or how gross its negligence, it goes scot free, and the property owner has no redress, if some extraordinary action of the elements intervene. The suggestion that if the carrier had promptly begun the execution of its contract, some other bolt from a clear sky might have fallen, and, therefore, it is not absolutely certain that the owner would not have suffered loss in any event, is too hypothetical and artificial to find place in a practical system of administering human affairs. In the obvious interests of justice, a direct exception should be grafted upon the theory of proximate and remote causes by holding that whenever a person by his, or its, negligence exposes the person or property of another to an act of God, that otherwise presumably would have been escaped, damages may be recovered against the negligent person for the injury sustained. Such a rule would treat an act of God not as an independent agency, but as identical with the damage or loss it produces, and confine legal consideration to antecedent causes. In effect this is what has been done by the courts of New York, Minnesota, Iowa, and Alabama, but they have proceeded not straight-forwardly but by casuistical distinction.

This suggestion for an avowed change in the law is made for the consideration of courts before which the question shall come as one of first impression, and, more particularly, of courts that are now committed to the view of the Supreme Court of the United States. It would be entirely legitimate for tribunals in the latter class to overrule their former decisions without an enabling statute. Decisions of that kind do not afford a basis of property rights of persons who have acted after they were rendered, as was the case in *Muhlker v. New York and Harlem R. R. Co.*[14] It would not be seriously claimed that a contractual right existed in the continuation as to future transactions of a theory of exemption from liability on tort. Although there be no legal obligation a court if it felt morally constrained might adopt the same course in a tort case that was taken by the Supreme Court of North Carolina in a criminal case. In *State v.* Bell, (136 N. C., 674) a former decision interpreting a criminal statute was overruled. A new trial being granted, it was, how-

[14] 173 N. Y., 549; 197 U. S., 544.

ever, directed that the same be had under the law as declared in the discredited adjudication, "but the construction now put upon the statute will be applied to all future cases."

The writer preceives no valid objection to disregarding the act of God as a proximate cause, in cases of negligence by ordinary individuals, or copartnerships, as well as by common carriers. But, if this innovation should seem too sweeping, it might be made to apply only to common carriers, under the historical policy of holding them to exceptional and extraordinary liability. In any event, the rules in question principally concern common carriers, and, therefore, the recent course of decisions, in which, without statutory aid, courts have assumed radical powers in formulating and differentiating common-carrier law, is pertinent.

There has been a decided tendency of late to limit the scope of the status of common carrier. In *Griffin v. Manice,*[15] and *Edwards v. Manufacturers' Bldg. Co.,*[16] it was held, that proprietors of office buildings, operating passenger elevators, are not common carriers. (*Contra*: *Treadwell v. Whittier.*)[17] In *Haskell v. Boston District Messenger Co.,*[18] it was held by the Supreme Judicial Court of Massachusetts that messenger companies are not essentially common carriers, and, further, that the knowledge of such a company that messengers sent out by it are sometimes employed to carry money, does not render it a common carrier, where it exercises no control over a messenger during his employment for that purpose by a patron. In *Meisner v. Detroit, etc., Ry.,*[19] it was held by the Supreme Court of Michigan, that where a corporation organized to own and operate ferries on a river, also owned and operated an amusement park, with special steamers for the transportation of persons to and from the park steamers, and might refuse transportation upon them to anyone at its pleasure, in like manner as proprietors of theaters may determine arbitrarily who shall be admitted.

All of these decisions have been made upon a simple common law basis, and show a disposition to withhold the application of the stringent rules affecting common carriers, evolved by more primitive social and industrial conditions, from affairs as to which they are not now necessary for public protection. Conversely, the courts may properly modify the common law by extending a carrier's liability where the same *is* necessary for justice.

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[15] 166 N. Y., 197.
[16] 61 Atl. (R. I.), 646.
[17] 80 Cal., 574.
[18] 76 N. E., 215.
[19] 118 N. W., 14.